

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK SEXTON ENTERS., INC.	:	
t/a SOMMER MAID	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 97-7104
SOCIETE DE DIFFUSION	:	
INTERNATIONALE AGRO-ALIMENTAIRE	:	
(SODIAAL), SODIAAL NORTH	:	
AMERICAN CORPORATION, SODIAAL	:	
ACQUISITION CORPORATION AND	:	
KELLER'S BAR/HOTEL	:	

M E M O R A N D U M

WALDMAN, J.

August 20, 1999

Plaintiff has asserted claims against defendants Societe de Diffusion Internationale Agro-Alimentaire ("SODIAAL-France"), SODIAAL North America Corporation ("SNAC"), SODIAAL Acquisition Corporation ("SAC") and Keller's Bar/Hotel ("Keller's") for breach of contract, tortious interference with plaintiff's "economic relationship" with its customers and violation of the Robinson Patman Act, 15 U.S.C. § 13a. Presently before the court is the motion of defendants SODIAAL-France and SAC to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

Plaintiff is a Pennsylvania corporation which produces, packages and distributes dairy products under the brand-name Sommer Maid for sale in the Middle-Atlantic region. Keller's has been an unincorporated division of defendant SNAC since its purchase from Borden's on December 29, 1989 as part of a

\$42,356,000 acquisition. SNAC is a Delaware corporation with its principal place of business in Harleysville, Pa. SNAC packages and markets butter and other dairy products. SNAC is a wholly owned subsidiary of SAC which is a holding company formed solely for the purpose of acquiring the shares of stock of SNAC. SAC is a Delaware Corporation. It conducts no business directly and has no employees or property. It is wholly owned by SODIAAL-France. SODIAAL-France is a French agricultural cooperative engaged in, inter alia, the collection and processing of milk products. It has no office, employees or property in the United States and has never engaged in business activity here.

Plaintiff claims that it entered into an oral agreement with Keller's in late 1989 or early 1990 under which Keller's would package a substantial portion of Sommer Maid butter in exchange for the provision by plaintiff of skilled employees to Keller's and a transfer of plaintiff's equipment to Keller's. This was the only equipment of its kind in existence east of the Mississippi River. Plaintiff also granted Keller's permission to order Sommer Made packaging materials from a third-party that produced the packaging with other equipment owned by plaintiff. Keller's promised not to solicit plaintiff's customers or target its portion of business from the parties' shared customers.

Plaintiff claims that in 1993 Keller's began soliciting business from plaintiff's customers in violation of the

agreement. Keller's also allegedly disclosed to plaintiff's customers that Keller's packaged plaintiff's product and raised prices for products sold to plaintiff to rates higher than Keller's charged other customers. Plaintiff claims that these actions were part of an effort to drive it out of business.

SODIAAL-France and SAC maintain that they do not have forum contacts sufficient to sustain personal jurisdiction over them.

Plaintiff has been permitted the opportunity to engage in discovery to support its jurisdictional allegations. To withstand the Rule 12(b)(2) motion, the plaintiff bears the burden of making at least a prima facie showing of personal jurisdiction with affidavits or other competent evidence. See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990); Time Share Vacation Club v. Atlantic Resorts, Inc., 735 F.2d 61, 66-67 n.9 (3d Cir. 1984); Arch v. American Tobacco Co., 984 F. Supp. 830, 834 (E.D. Pa. 1997). To make such a showing, a plaintiff must demonstrate "with reasonable particularity" contacts between the defendant and the forum sufficient to support an exercise of personal jurisdiction. Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). Merely re-stating the allegations in the pleadings will not enable a plaintiff to withstand a Rule 12(b)(6)(2) motion. Time Share Vacation Club, 735 F.2d at 66.

General personal jurisdiction may be established by showing that a defendant conducts a continuous and systematic part of its business in the forum. Fields v. Ramada Inn, 816 F. Supp. 1033, 1036 (E.D. Pa. 1993). Contacts are continuous and systematic if they are "extensive and pervasive." Id.

Specific personal jurisdiction may be established by showing that a defendant undertook some action by which it purposefully availed itself of the privilege of conducting activities within the forum, thus invoking the benefits and protections of the laws of the forum. Hanson v. Denckla, 357 U.S. 235, 253 (1958). To invoke specific jurisdiction, a plaintiff's cause of action must arise from or relate to the defendant's forum related activities, such that the defendant should reasonably anticipate being haled into court in the forum. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984); Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 690 (3d Cir.), cert. denied, 498 U.S. 847 (1990). A determination of whether sufficient minimum contacts exist essentially involves an examination of the relationship among the defendant, the forum and the litigation. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

Once a showing of sufficient minimum contacts has been made, a court may find that an exercise of personal jurisdiction

is nevertheless incompatible with due process upon the presentation of compelling evidence of other factors which would make an order requiring a defendant to litigate in the chosen forum inconsistent with "fair play and substantial justice." See Vetrotex Certainteed v. Consolidated Fiber glass, 75 F.3d 147, 150-51 (3d Cir. 1996); D'Almeida v. Stork Brabant B.V., 71 F.3d 50, 51 (1st Cir. 1995), cert. denied, 517 U.S. 1168 (1996); Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 481 (3d Cir. 1993). The factors generally considered are the burden on the defendant to litigate in the forum, the interest of the forum state in the litigation, the plaintiff's interest in obtaining meaningful relief, the general interest in obtaining efficient resolution of controversies and any mutual interest of the various states in furthering any relevant underlying social policies. Id. at 483.

That a court has personal jurisdiction over an alleged conspirator does not confer jurisdiction over an alleged co-conspirator which does not itself have sufficient minimum contacts with the forum. Murray v. National Football League, 1996 WL 36391, *15 (E.D. Pa. June 28, 1996); Hawkins v. Upjohn Co., 890 F. Supp. 601, 608-09 (E.D. Tex. 1994).

Plaintiff contends that SNAC is the alter ego of SAC and SODIAAL-France and that SNAC's forum contacts may thus be imputed to them.

"Generally, a foreign corporation is not subject to the jurisdiction of the forum state merely because of its ownership of the shares of stock of a subsidiary doing business in that state." Lucas v. Gulf & Western Indus., Inc., 666 F.2d 800, 805-06 (3d Cir. 1981) (internal quotations omitted); see also Clark v. Matsushita Elec. Indus. Co., 811 F. Supp. 1061, 1067 (M.D. Pa. 1993) (even one hundred percent ownership is not sufficient). Where, however, the subsidiary is merely the "alter ego" of the parent corporation, its forum contacts may be attributed to the parent. See Arch, 984 F. Supp. at 837; Brooks v. Bacardi Rum Corp., 943 F. Supp. 559, 562 (E.D. Pa. 1996).

Alter ego status, however, requires more than a close relationship or coordination and cooperation among the parties. See Katz v. Princess Hotels Int'l, Inc., 839 F. Supp. 406, 410-11 (E.D. La. 1993); Hopper v. Ford Motor Co., 837 F. Supp. 840, 844 (S.D. Tex. 1993). Overlapping boards of directors and common officers, although relevant to the inquiry, are not enough to render one entity the alter ego of the other. See Arch, 984 F. Supp. at 838; Clark, 811 F. Supp. at 1068; Dutoit v. Strategic Minerals Corp., 735 F. Supp. 169, (E.D. Pa. 1990), aff'd, 922 F.2d 830 (3d Cir. 1990); Dickson v. The Hertz Corp., 559 F. Supp. 1169, 1174 (D.V.I. 1983).

Disregard of the subsidiary's corporate formalities or pervasive control by the parent is required to make the

subsidiary its alter ego for the purpose of imputing forum contacts. See Arch, 984 F. Supp. at 837; Brooks, 943 F. Supp. at 562-63. "[T]he degree of control exercised by the parent must be greater than normally would be associated with common ownership and directorship." Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1160 (5th Cir. 1983). See also Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 152 (3d Cir. 1988) (applying same standard in addressing propriety of piercing corporate veil); Arch, 984 F. Supp. at 837 (following Hargrave); Savin Corp. v. Heritage Copy Prods., Inc., 661 F. Supp. 463, 469 (M.D. Pa. 1987) (same).

Plaintiff suggests SODIAAL-France and SAC have exercised pervasive control over SNAC through Robert Brzuszczak. Mr. Brzuszczak has been a director of SAC and a director of SNAC since February 1, 1993. Since that time Mr. Brzuszczak has also been Vice-President and Treasurer of SNAC, and was delegated by the SNAC board to perform oversight functions and other responsibilities of the CEO at times when that position was vacant. There is substantial overlap between the directors and officers of SNAC and of SAC and SODIAAL-France.¹

Plaintiff submits an affidavit of Richard Sterling who states that he applied in February 1993 for the position of CEO

¹The directors of SNAC are Gerard Budin, Nicolas LeChatelier and Robert Brzuszczak. All three are directors of SAC. Mr. Budin is also a director of SODIAAL-France. The officers are Nicolas LeChatelier, Robert Brzuszczak, Patrick Julien and Burton Alter.

of SNAC and was thereafter interviewed by Mr. Brzuszczak. Mr. Brzuszczak stated during the interview that he had the authority to make the hiring decision and that whoever was hired for the position would "report directly to SODIAAL in France." Mr. Brzuszczak stated that he had been "traveling in and out of the United States working with Kellers."

That a director and ranking officer of SNAC was authorized to hire a CEO for SNAC is not remarkable. That a director or officer of SNAC was "working with Keller's," a division of SNAC, is also hardly remarkable.

That the CEO of SNAC in fact reported directly to SODIAAL could be significant. Mr. Sterling, however, was not hired and thus did not report to anyone at SNAC or SODIAAL. Of significance is the affidavit of Gary Rhodes, also submitted by plaintiff. Mr. Rhodes was in fact hired and served as the CEO of SNAC from June 1993 to August 1996. Mr. Rhodes states that he "took direction regarding the management of SNAC directly from Mr. Brzuszczak and the board of directors of SNAC," which then included Mr. Brzuszczak. There is nothing remarkable about the CEO of SNAC taking direction from the directors of SNAC. Philip Kane avers that following the departure of Mr. Rhodes, he and the other SNAC managers have made the day to day business decisions for SNAC subject to oversight by Mr. Brzuszczak and the other SNAC directors.

Plaintiff also submitted a February 10, 1993 memorandum from Michael Copertino, Administrative Manager of SNAC, indicating that Mr. Brzuszczak had approved wage increases for non-union employees and would shortly review increases for managerial employees. Particularly during the search for a CEO for SNAC, there is nothing remarkable about a director or officer of SNAC undertaking responsibility for reviewing and approving pay raises for SNAC employees.

Plaintiff seems particularly to rely on the fact that Mr. Brzuszczak used stationery with the "SODIAAL" logo, shared by SODIAAL, SNAC and SAC, bearing the address of SODIAAL-France in writing on June 11, 1993 to Ken Northway, General Manager of Mayfair Creamery, a division of SNAC. That Mr. Brzuszczak, when working from France, used a piece of stationery with the SODIAAL-France address is simply not evidence that it was pervasively controlling SNAC or that any corporate formalities were being ignored. Indeed, the content of this letter belies such a suggestion.

Mr. Brzuszczak wrote to inform Mr. Northway that "Mr. Gary Rhodes is coming in[to] SNAC as CEO" and "will have full authority over Mayfair Creamery operations." That a director of SNAC authorized to recruit a CEO for SNAC would advise a SNAC division manager of the selection of the CEO who would have "full authority" over SNAC operations does not suggest any disregard of SNAC's corporate formalities or control of SNAC by SODIAAL-France

or SAC, let alone control "greater than normally would be associated with common ownership and directorship." See Hargrave, 710 F.2d at 1160.

That SODIAAL-France or SAC may be interested in the state of affairs at SNAC would not demonstrate untoward control. A parent may properly be interested in and involved with a subsidiary. Craig, 843 F.2d at 152. Conclusory statements that SODIAAL-France or SAC pervasively controlled SNAC cannot substitute for competent evidence of the actual exercise of such control or that SNAC was operating as SODIAAL-France's or SAC's agent.

There is no evidence of the commingling of funds or the disregard of corporate formalities. SNAC maintains separate books and records. There is no evidence that SNAC is undercapitalized. To the contrary, it appears to have substantial assets. SNAC owns its own equipment and facilities. It has 200 employees, none of whom are shared with SODIAAL-France or SAC. SNAC purchases no products from SODIAAL-France or any of its other subsidiaries. SNAC purchases its products in the United States and markets them pursuant to marketing plans developed by its own employees.

In short, plaintiff has not made a showing sufficient to justify the exercise of personal jurisdiction over SODIAAL or SAC. Accordingly, defendants' motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of August, 1999, upon consideration of the Motion of defendants Societe de Diffusion Internationale Agro-Alimentaire and SODIAAL Acquisition Corporation Dismiss for Lack of Personal Jurisdiction (Doc. #27), and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and Societe de Diffusion Internationale Agro-Alimentaire and SODIAAL Acquisition Corporation are **DISMISSED** as parties in this action for lack of personal jurisdiction.

BY THE COURT:

JAY C. WALDMAN, J.